IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

Fazal Rahman Versus Smt. Shabana & Anr.

S.B.CRIMINAL REVISION NO.279/2006
against the Order dated 25.2.2006 passed
by Additional Chief Judicial Magistrate No.3,
Bikaner.

Date of Order : 25/04/2006

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. Iqbal Sherani for the petitioner.

Mr. H.S.Srimalee for the non-petitioners.

BY THE COURT:-

This criminal revision petition under Section 397/401 Cr.P.C. is directed against the order dated 25.2.2006 passed by Additional Chief Judicial Magistrate No.3, Bikaner (for short 'the trial court' hereinafter), whereby the trial court awarded maintenance @ Rs. 1000/- per month in favour of non-petitioner No.2, a minor daughter of the petitioner aged about 5 years from the date of application on an application filed by non-petitioners under Section 125 Cr.P.C. Aggrieved by the order impugned, the petitioner has filed the instant revision

petition.

I have heard learned counsel for the petitioner and the counsel appearing for the non-petitioners. Carefully gone through the judgment and order impugned.

It is contended by the counsel for the petitioner that the petitioner is prepared to keep and maintain the non-petitioners, but the non-petitioner AW-1 Smt. Shabana in her statement categorically stated that even if the petitioner is prepared to keep and maintain them, neither she is prepared to live with the petitioner nor prepared to hand over the non-petitioner No.2 minor daughter of the petitioner. Learned counsel further submits that non-petitioner No.1 is adamant in not resuming the matrimonial home as also not allowing the petitioner to keep the non-petitioner No.2 and claimed the maintenance. Learned counsel for the petitioner has relied on a decision of this Court in Mst. Shahida Vs. Chhuttan Khan, 1986 Cr.L.R. (Raj.), 321, wherein this Court held that when the husband made a proposal that boy should be kept with him and he was ready to maintain him. But this proposal was also rejected by the petitioner, and she is not ready to hand over the child to the non-petitioner therein. On this premise, this Court held that the non-petitioner therein cannot be directed to pay the interim maintenance for the child also.

Learned counsel appearing for the non-petitioners submits that though the trial court refused to grant maintenance in favour of non-petitioner No.1 wife of the petitioner by the order impugned which has not been challenged by the non-petitioner No.1, but the non-petitioner is not in a position to part with the child of about five years of age and therefore, the amount of maintenance awarded in favour of non-petitioner No.2, a minor daughter of the petitioner aged about 5 years, cannot be said to be excessive.

I have given my thoughtful consideration to the rival submissions made by the counsel for the parties.

In her statement, AW-1 Shabana stated that the petitioner by undertaking the work of making body of auto-rikshaw earns about Rs. 5000/- to Rs. 6000/- per month. No foundation for such a statement has been made in her statement. She categorically stated that even if the petitioner is prepared to keep and maintain her, at any rate, she is not willing to live with the petitioner, even if there is an order of Court, yet she would not live with the petitioner. She further stated that she would not hand over the minor child to the petitioner even the petitioner is prepared to maintain his minor daughter. The petitioner himself appeared as NAW-1 before the trial court and stated that he is working as labourer and earns Rs.70-80 per

day. He has also made a statement that he is prepared to keep the non-petitioners and maintain them. The statement made by the witness in his examination-in-chief had not been challenged in cross-examination and the necessary corollary is that the adversary does not want to challenge the statement made in the examination-in-chief. Though, in the cross-examination, a question was put to the witness that a person making the body of auto-rikshaw earns how much amount, the petitioner has not given any specific answer because he stated that he is not making/ manufacturing the taxi body but he is a labourer. From the record, it no where appears that the petitioner sought custody of the child. The minor child non-petitioner No.2 is of five years of age and unless the question of custody is determined by the competent Court, it cannot be said that the petitioner is not liable to maintain his minor daughter. Learned counsel for the petitioner submits that interim maintenance awarded has already been paid to the non-petitioners. Having regard to the facts and circumstances and keeping in view the income of the petitioner which according to the petitioner is Rs.70-80 per day, in my view, a sum of Rs. 1000/- per month as maintenance awarded by the trial court appears to be excessive and a sum of Rs. 500/- from the date of passing of the order by the trial court would be just and proper maintenance for a minor child of five years keeping in view the status of the parties.

Consequently, the revision petition is partly allowed. The order impugned dated 25.2.2006 is modified to the extent that the non-petitioner No.2 is entitled for maintenance at the rate of Rs.500/- per month from the date of order of the trial court.

(H.R.PANWAR),J.

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